No. 89-544

In The

Supreme Court of the United States

October Term, 1989

PASQUALE J. CURCIO, JOHN ANDREW KAY and DAVID J. WILMOTT, as individuals and residents of the County of Suffolk,

Petitioners,

versus

E. THOMAS BOYLE, County Attorney of the County of Suffolk, ELIZABETH TAIBBI, Clerk of the Suffolk County Legislature, and GEORGE WOLF, as a Commissioner of the Suffolk County Board of Elections,

Respondents,

HAROLD J. WITHERS, as a Commissioner of the Suffolk County Board of Elections,

Non-Appearing Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Did the New York appellate courts err in holding that the petitioners, sponsors of an initiative and referendum changing the format of a local legislative body, were required by the Fourteenth Amendment to the United States Constitution, to establish by computerized mathematical analysis that the proposed weighted supervisor system would meet "one-person, one-vote" standards, and that the failure to do so compelled the removal of the proposal from the electorate, even though the proposal specified the manner in which the vote of each supervisor was to be computed and required that it conform to constitutional requisites?

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CASES

Petitioners, Pasquale J. Curcio, John Andrew Kay and David J. Wilmott, respectfully petition this court for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York in essence sustaining a determination of local governmental official ruling that an initiative and referendum proposal was invalid.

OPINIONS BELOW

The order of the Court of Appeals dismissing the appeal for want of a substantial constitutional question and denying permission to appeal is reported at 74 N.Y.2d 733, ___ N.E.2d ___, ___ N.Y.S.2d ___ (1989), and may be found in the appendix. The opinion and order of the Appellate Division is reported at 147 A.D.2d 194, 542 N.Y.S.2d 1010, 543 N.Y.S.2d 913 (2d Dept. 1989), and is reproduced in the appendix. The opinions of the Supreme Court, whose determination was reversed by the Appellate Division, are reported at 142 Misc.2d 1030, 542 N.Y.S.2d 1005 (Sup. Ct. Nassau Co. 1989), and are reproduced in the appendix.

JURISDICTION

The judgment of the New York Court of Appeals was rendered on June 30, 1989. This petition is being filed within 90 days from the dismissal of the appeal by the New York Court of Appeals. Under New York law, the dismissal constituted an adjudication on the merits, sustaining the constitutionality of the statute. *Matter of*

Capoccia, 59 N.Y.2d 549, 553, 453 N.E.2d 497, 498 (1983). Thus, since the dismissal by the New York Court of Appeals was for want of a substantial constitutional question, it amounts to an affirmance and the order of dismissal constitutes the judgment reviewable by this Court. *R.J. Reynolds Tobacco Co. v Durham County*, 479 U.S. 131, 138-139 (1986); *Tumey v Ohio*, 273 U.S. 510, 515 (1927). The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

(reproduced in appendix)

United States Constitution, Fourteenth Amendment

RAISING THE FEDERAL QUESTION

The claim that the United States Constitution required rejection of the initiative and referendum was injected into the case by respondents by the letter of rejection from the County Attorney, and was raised by him at the commencement of the proceedings in his pleading. Although rejected by the trial court, it was accepted by New York appellate courts.

STATEMENT OF THE CASE

A. Introduction

This proceeding was commenced to review a determination of the Suffolk County Attorney, which

rescinded an earlier determination, and ruled that a proposed amendment to the Suffolk County Charter, was not a proper subject for a charter amendment. The proposal, which was to be submitted to the voters at the next general election, would have substituted a system of weighted voting by a Board of Supervisors in place of the existing separate Suffolk County legislature, whose members are elected from single member districts.

B. The Suffolk County Charter

Article 7 of the Suffolk County Charter and Article 7 of the Administrative Code provide a mechanism for its amendment by the process of initiative and referendum (R: 149 *et seq*). There is a multi-step process that begins by the circulation of the proposal in an effort to obtain one thousand signatures from eligible voters, including at least 50 from each of Suffolk County's ten towns (Charter § C7-3[A]; R: 150). The petition, together with a filing fee of $200.00, is then filed with the Clerk of the Suffolk County Legislature, who then forwards the petition to the Suffolk County Attorney (*ibid.*).[1]

The County Attorney then reviews the petition to determine if it is legal and proper in form (§ C7-3[B]; R: 151). Unless he or she "determines the text to be illegal and improper as to form," the list of signatures is to be forwarded "to the Board of Elections to certify that it has one thousand (1,000) valid signatures" (*ibid.*). The Board

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[1] The Suffolk County Charter and Administrative Code also set forth the applicable time frames within which certain acts must be undertaken. For the sake of clarity, such time frames are omitted from the discussion unless otherwise relevant.

of Elections is then to review the petition "and certify that the petition contains the signatures of one thousand (1,000) registered voters" (§ C7-3[C]; R: 151). Following the certification, the County Attorney is to prepare a title and summary and submits everything to the Clerk of the Legislature (*ibid.*).

The bill is then delivered to the County Executive, and the Presiding Officer of the Legislature and placed on the table of the Legislature at its next session (§ C7-3[D]; R: 151). If the Legislature fails to act within 60 days after the matter is placed on the table, the sponsor can file a second petition to place the matter before the electorate (§ C7-3[E],[F],[G]; R: 152).

In this second round, the "number of signatures necessary shall be equal to five percent (5%) of the total number of votes cast for all candidates who ran for governor at the last gubernatorial election" (Administrative Code, § A7-1[B]; R: 155). The Board of Elections, to whom the petitions are delivered by the Clerk of the Legislature, "must determine the total number of valid signatures on the petition. In determining the number of signatures, the Board shall presume valid a signature if it appears valid on its face" (§ A7-3; R: 156).

There is also a regional distribution requirement, albeit quite different from the round one criteria: "The petition must contain, within its number of valid signatures, signatures of at least five percent (5%) of the total number of votes cast within each of the ten (10) towns of the county for all candidates who ran for Governor at the last gubernatorial election" (§ A7-4; R: 157). Unlike the rules governing the first round, however, an eligible voter

may file objections to the failure of the petition to meet the geographical distribution requirement, and the "Board of Elections shall determine the validity of the objections. The failure of a petition to contain a minimum number of signatures in each of the ten (10) towns shall be considered a fatal defect" (*ibid.*).

Once the Board of Elections determines that there are enough valid signatures, i.e., five percent of the gubernatorial vote, it returns the petitions to the Legislature (§ A7-3; R: 156-157). At this time, the Board apparently does not reach the geographical distribution requirement (*see, ibid.*, § A7-4, R:156-157). Instead, public notice is given by publication, and then objections may be filed within specified time frames, "in conformity with the Election Law § 6-154," including objections to the distribution requirement (*ibid.*). Once the time for filing objections has expired, the Clerk files the petitions and the objections with the Board of Elections for determination (§ A7-3; R: 157). Once that final hurdle is passed, the matter is placed on the ballot at the next general election (*ibid.*).

C. The Petition Under Review

Following decision of the Appellate Division in *Matter of Leirer v Ashare*, 132 A.D.2d 700, 518 N.Y.S.2d 180 (2d Dept. 1987), the petitioners, sponsors of the referendum, circulated a round one petition in substantially the same format approved by the Court in that case (R: 159-161). As in *Leirer*, the sponsors sought to have the County Legislature pass a local law amending the Suffolk County

Charter by replacing the Suffolk County Legislature with a weighted-voting system Board of Supervisors (*ibid.*).[2]

Under the proposal, there is to "be a modified weighted voting system based on the then current law on modified weighted voting systems, including the modified weighted voting standards enunciated and approved by the Court of Appeals in *Ianucci v Board of Supervisors* * * * and *Franklin v Krause* * * *." "In preparing each reapportionment, the Board of Supervisors shall employ an independent computerized mathematical analysis, and such other method or methods, as shall most nearly equalize the percentage of voting power of each town to its percentage of the total county population consistent with the standards enunciated in the **Ianucci** and **Franklin** cases, **supra**" (C2-3 of petition; R: 159).

The petition was duly filed with the Clerk of the Legislature on February 14, 1989, together with the requisite filing fee (R: 143). By letter dated March 2, 1989, the Suffolk County Attorney, found the proposed legislation to be "a legal and proper subject for a charter amendment" and "approve[d] the same as to form" (R: 162). He then directed the Clerk of the Legislature, appellant Taibbi, to forward the petitions to the Board of Elections.

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[2] Petitioners in the *Leirer* case were unable to reach the second round subsequent to the Court's decision due to several factors, including the difficult time frames set forth in the Charter and Code which, among other things, invalidate signatures more than a year old (Administrative Code, § A7-1[D]; R: 156).

"The Board of Elections must certify one thousand signatures within twenty (20) days after receipt of certification" (R: 162). No mention is made of any requirement of ascertaining whether the geographical distributional requirement has been met (R: 162).

Apparently, for some undisclosed reason, the petitions were not forwarded to the Board of Elections. Instead, on March 28, 1989, the Suffolk County Attorney purported to issue a superseding determination (R: 164-168), "[b]ased on a decision of the United States Supreme Court, dated March 22, 1989" (R: 164). In a five page letter, County Attorney Boyle ruled that (1) a Supreme Court decision (*Board of Estimate v Morris*, ___ U.S. ___, 109 S.Ct. 1433) had rendered any weighted-voting scheme unconstitutional (R: 165-167); (2) there was insufficient time to adopt a judicially approved plan (R: 167-168); and (3) the proposal was now too "vague and indefinite" to be placed on the ballot (R: 168). In addition, in a footnote (R: 166), the County Attorney parenthetically observed that the proposal raised "substantial legal issues" under the Voting Rights Act of 1965 (R: 166).

D. This Proceeding

Petitioners commenced this proceeding by order to show cause signed March 31, 1989, and petition duly verified on the same date, seeking to, *inter alia*, set aside the County Attorney's second determination (R: 135-138,

139-148).[3] Appellants submitted verified answers (R: 177-183, 184-190), which, besides the claims set forth in the County Attorney's superseding letter, including that of a violation of the Voting Rights Act, raised a new defense, namely that the proposed charter amendment violated section 10(1)(ii)(a)(13)(f) of the Municipal Home Rule Law as a second restructuring of the Suffolk County Legislature within a decade (R: 180, 187). Although they denied paragraph 20 of the petition, which alleged that petitioners had obtained 1,686 valid signatures (R: 143, 178, 185), no claim was raised concerning any failure to meet a geographical distribution requirement.

The Commissioners of the Board of Elections "advise[d] the Court that they consider themselves neutral parties in this proceeding, and that, therefore, they take no position with respect to the application which is made" (R: 13). In subsequently reviewing the petitions on April 11, 1989, at 6:00 P.M., both Commissioners agreed that there were at least one thousand valid signatures (R: 211, 212), but Commissioner Wolf contended that there were not at least 50 valid signatures from each town, and claimed that the petition was invalid on that basis (R: 212). The claim was raised in Mr. Wolf's reply, verified on

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[3] On the return date of the application, appellants sought an adjournment, which was granted on the condition that the petitions be submitted to the Board of Elections to verify that the petitions contained in excess of 1,000 signatures.

April 12, 1989 (R: 197-201). Consequently, only Commissioner Withers would issue a certification (R: 211).

The County Attorney never amended his pleading to raise the issue of whether the town distribution requirement had not been met, and with good reason. The issue had not been raised in any of his former determinations, and the Charter does not provide for the Board of Elections, or anyone else, to go beyond the face of the signatures in ascertaining whether a distribution requirement has been met. As petitioners urged, when the issue came up, "[t]here is nothing in this statute * * * that requires the Board to certify 50 valid signatures from each and every town" (R: 86). Just in case, petitioners submitted a supplemental memorandum of law which urged, explicitly to protect the record, that if the court were inclined to read an additional function for the Board of Elections into the Suffolk County Charter – an issue belatedly injected into the case by Commissioner Wolf, who, it is submitted waived the issue at the first appearance and lacked standing to raise it – such a requirement would be unconstitutional (R: 274-285).

In a decision and order and judgment entered April 19, 1989, Justice Morrison, relying on *Franklin v Krause*, 32 N.Y.2d 234, 298 N.E.2d 68, 344 N.Y.S.2d 885 (1973), *appeal dismissed* 415 U.S. 904 (1974), *Bechtle v Board of Supervisors*, 81 A.D.2d 570, 441 N.Y.S.2d 403 (2d Dept.), *affd.* 54 N.Y.2d 674, 425 N.E.2d 897, 442 N.Y.S.2d 509 (1981), and *League of Women Voters v Nassau County Board of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied sub. nom. Schmertz v Nassau County Board of Supervisors*, 469 U.S. 1108 (1985), found the proposal in all respects proper. He observed that *Board of Estimate v Morris*, ___ U.S. ___, 109 S.Ct. 1433,

had not addressed the concept of weighted voting and in no way detracted from the governing precedents. Citing *Matter of Leirer v Ashare, supra*, Justice Morrison found no merit to any other objection. Finally, Justice Morrison observed that the 50 signature requirement from each town would be unconstitutional, on authority of *Socialist Workers Party v Rockefeller*, 314 F.Supp. 984 (S.D.N.Y.), *affd.* 400 U.S. 806 (1970), and distinguishing *Lockport v Citizens for Action*, 430 U.S. 259 (1977), as involving separate voting groups with distinct interests and a circumstance in which a referendum was held. Nonetheless, he directed that a hearing be held so that the record would be complete and expedite appellate review (R:20-25; 142 Misc.2d 1030, 542 N.Y.S.2d 1005).

That hearing was held and in a decision, order and judgment entered on April 28, 1989, Justice Morrison clarified his prior determination by observing "that the Charter, by its terms, renders the geographic objection of respondent Wolf academic. While the Charter requires the inclusion of fifty registered voters from each town (S.C.C. C7-3A), it limits the function of the Board of Elections to a determination as to whether 'the petition contains the signatures of one thousand voters'. (C7-3C). If it does so, the Board is directed to so certify. There is no authorization for the Board to withhold certification based upon a claim that the geographic distribution requirements are unsatisfied. Since the effect of the geographic distribution requirement is to restrict the citizens' rights to initiative and referendum, I believe it inappropriate to erect a bar by implication" (R: 41). Following the hearing, however, he sustained three challenges to

signatures from East Hampton, thus finding 47 signatures from that town. In light of the ruling that "the Board of Elections has no power under the Charter or the Constitution to reject the petitions because of geographic inadequacy", the Court "direct[ed] that the Board of Elections certify that the petitions bear the signatures of one thousand registered voters (S.C.C. C7-3c)" (R:41-44).

On appeal, the Appellate Division, Second Department, reversed. That court reasoned that the proposal was defective because petitioners "as proponents of a weighted voting plan" had to "bear the burden of proving that their proposal will comport with the one person one vote requirement imposed by the Equal Protection Clause of the Fourteenth Amendment * * * to meet this burden, it is incumbent upon the proponents * * * to proffer computerized mathematical analysis of the proposed specific weighted voting plan which would enable the court to reach a considered judgment that that proposal to be implemented will comply with 'one person one vote principles.'" Because petitioners had not done so and because without it the proposal was also unconstitutionally vague, the determinations of Supreme Court was reversed, 147 A.D.2d 194, 542 N.Y.S.2d 1010. An appeal from the Appellate Division order was dismissed by the Court of Appeals, and leave for appeal denied, 74 N.Y.2d 733 (1989). Although the matter cannot be placed on the ballot, the issue is not moot. *Anderson v Celebrezze*, 460 U.S. 780, 784 n.3 (1983); *Storer v Brown*, 415 U.S. 724, 737 n.8 (1974).

THE REASONS FOR GRANTING THE WRIT

The decision in this case, resting squarely on the Fourteenth Amendment to the United States Constitution, puts the proverbial cart before the horse in matters involving the sensitive question of local governance. As a matter of common sense, the *form* of government is to be determined first, and if that form of government is constitutional, then, if the voters adopt it, elected officials must implement it in a constitutional fashion. Here, the trial court correctly rejected respondents' constitutional challenge to the form, holding that this court's decision in *Board of Estimate v Morris*, ___ U.S. ___, 109 S.Ct. 1433 (1989), did not overrule *Franklin v Krause*, 415 U.S. 904 (1973), *dismissing appeal from* 32 N.Y.2d 234, 298 N.E.2d 68, 344 N.Y.S.2d 885 (1974), which had held a weighted-voting board of supervisors system to be constitutional. The Appellate Division did not disagree, holding instead, in purported reliance on *Reynolds v Sims*, 377 U.S. 533 (1964), that petitioners did not carry their burden of showing that their proposal met the "one-person, one-vote" requirements by indicating the precise number of votes that each supervisor would possess by "computerized mathematical analysis," and that this also rendered the proposal unconstitutionally vague.

Nothing in *Reynolds v Sims, supra*, even remotely places such a requirement on sponsors of legislation. The proposal details the manner in which the votes are to be allocated and requires that the method adopted to constitutional strictures. Given the need for flexibility, because of changing population, there is no other sensible manner in which to draft legislation. Under the reasoning employed here, no entity could ever change the structure

of government because the need for flexibility would collide with the Appellate Division's requirement of specificity, which could not survive constitutional challenge.

The decision below is a gross departure from elementary principals of analysis. If a weighted-voting board of supervisors system is constitutional, and we submit that it is, *Franklin v Krause, supra, League of Women Voters v Nassau County Board of Supervisors*, 737 F.2d 155 (2d Cir. 1984), *cert. denied sub. nom. Schmertz v Nassau County Board of Supervisors*, 469 U.S. 1108 (1985), then there is nothing in the constitution that prohibits a local electorate from adopting it. Once it is adopted, the voting apportionment must, of course, meet the standards in *Board of Estimate v Morris, supra.*

Indeed, the *Morris* case points out the utter fallacies in reasoning applied by the Appellate Division here. In *Morris*, the Court unanimously held that the New York City Board of Estimate violated the equal protection clause because representatives did not vote in proportion to population. In the lower courts one of the alternatives to the method employed was weighted-voting, 647 F. Supp. 1463, 1476-1477 (E.D.N.Y. 1986), *affd.* 831 F.2d 384 (2d Cir. 1987), the method sought to be adopted here. This Court left the remedy for local option, within the framework, of course, of constitutional strictures, 109 S.Ct. at 1553 n.11. Under the Appellate Division analysis, however, there could be no restructuring of the Board of Estimate under weighted-voting because the electorate had never been advised on the weighted-vote each representative would possess. In point of fact, that is why Respondents had claimed that *Morris* precluded

weighted-voting in any local legislative body in their presentations below.

Simply because a decision is incorrect does not, of course, compel review here. But the question posed transcends the interest of Suffolk County, and, indeed, the State of New York. The decision of the Appellate Division handicaps the People in determining how they shall be governed. It straight-jackets the right of self-determination, and, undoubtedly, will be employed in other states and territories to defeat self-determination.

That *Board of Estimate v Morris, supra,* marks no departure from established principles should be determined by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED: Lindenhurst, New York
September 28, 1989

Respectfully submitted,

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APPENDIX

State Of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty day of June A. D. 1989.

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-13 Mo. No. 767
In the Matter of Pasquale J. Curcio, et al.,
Appellants,
v.
E. Thomas Boyle, et al.,
Respondents.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

Judge Titone took no part.

/s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

In the Matter of PASQUALE J. CURICIO et al.,
Respondents, v E.
THOMAS BOYLE et al., Appellants, et al., Respondents.

Second Department, June 7, 1989

APPEARANCES OF COUNSEL

Bower & Gardner (John J. Bower, Stanley Fink and *Barry G. Saretsky* of counsel), for appellants.

Schapiro & Reich (Perry S. Reich and *Steven Schapiro* of counsel), for Pasquale J. Curcio and another, and *Bracken & Margolin (Martin Bradley Ashare* of counsel), for David J. Wilmott, respondents. (One brief filed.)

Pelletreau & Pelletreau (Brian McCaffrey of counsel), for Harold J. Withers, respondent.

OPINION OF THE COURT

Per Curiam.

The petitioners Pasquale J. Curcio, John Andrew Kay and David J. Wilmott are the proponents of an initiative measure (*see*, Suffolk County Charter § C7-2) which would place a referendum on the ballot to amend the Suffolk County Charter by dissolving the current 18-member County Legislature, and replacing it with a 10-member Board of Supervisors. Under this proposal, the Board of Supervisors, consisting of the Supervisors of the 10 towns within the county, would vote on matters before it pursuant to a modified weighted voting plan which

would assign votes to the various Supervisors in proportion to the sizes of their respective constituencies *(see, Franklin v Krause,* 32 NY2d 234).

Pursuant to the applicable provisions of Suffolk County Charter article VII, the petitioners obtained the signatures of more that 1,000 registered voters countywide and submitted the text of the proposed initiative measure to the appellant Elisabeth Taibbi, Clerk of the Suffolk County Legislature. Clerk Taibbi then forwarded the proposed initiative measure to the appellant E. Thomas Boyle, County Attorney of Suffolk County, for his review. County Attorney Boyle ultimately rejected the proposed initiative measure as constituting "an illegal Charter amendment as to substance as well as form" *(see,* Suffolk County Charter § C7-3 [B]). Thereafter, the petitioners commenced the instant proceeding challenging County Attorney Boyle's determination.

Contrary to the findings of the Supreme Court (___ Misc 2d ___), we find that County Attorney Boyle correctly rejected the petitioners' proposed initiative measure. As proponents of a weighted voting plan, the petitioners bear the burden of proving that their proposal will comport with the "one person one vote" requirement imposed by the Equal Protection Clause of the Fourteenth Amendment *(see, e.g., Reynolds v Simms,* 377 US 533, *rearg denied* 379 US 870). To meet this burden, it is incumbent upon the proponents of any weighted voting proposal to proffer computerized mathematical analyses of the proposed specific weighted voting plan which will enable the court to reach a considered judgment that the proposal to be implemented will comply with "one person one vote" principles *(Iannucci v Board of Supervisors,* 20

NY2d 244; *English v Lefever*, 94 AD2d 755; *Van Nostrand v Board of Supervisors*, 67 Misc 2d 1096; *see generally*, Johnson, *An Analysis of Weighted Voting as Used in Reapportionment of County Governments in New York State*, 34 Alb L Rev 1, 16-18). In the proceeding at bar, the petitioners totally failed to meet this burden and thus their proposal was properly rejected. We also agree with the County Attorney's rejection of the proposal on the ground of vagueness. Before considering such a sweeping change in the form of their local government, "[t]he voters are entitled to know precisely the extent and nature of the proposed changes submitted" *(Matter of Grenfell [Lawyer]*, 269 App Div 600, 603, *affd* 294 NY 610). The voters of Suffolk County have no way of ascertaining from the text of the proposed initiative measure precisely how their representation will be affected should this proposal become law. Just as the proponents of a weighted voting plan must present the specific mathematical analyses of their proposal for the court to reach a "considered judgment" *(Iannucci v Board of Supervisors*, 20 NY2d 244, 254, *supra)*, so too, the voters must be presented with enough of the specifics on the face of the proposal so that they may know exactly what they are being asked to approve or reject. The instant proposal, with its blanket references *(see, Matter of Grenfell [Lawyer]*, 269 App Div 600, 603, *supra)* to "the modified weighted voting standards enunciated and approved by the Court of Appeals in *Iannucci v Board of Supervisors*, 20 NY2d 244 * * * and in the voters from any of the towns within Suffolk County of precisely how many votes each of the respective Supervisors would cast. Thus, the voters would have no way of knowing how their representation would vary from the

present legislative scheme, or from that of their county neighbors under the proposed weighted voting plan. Clearly, such information must be available to the voters. However, under the petitioners' proposal the actual mechanics of the plan would not be settled until after its enactment. Thus, the paucity of information in the petitioners' proposal requires its rejection.

In light of the foregoing we need not reach the parties' remaining contentions. We note, however, that our determination of this appeal is not inconsistent with our prior determination in *Matter of Leirer v Ashare* (132 AD2d 700), as that case did not present the same issues as are raised on this appeal. Indeed, in that case an allegedly identical initiative measure was approved by this court as setting forth sufficient information upon which the voters could intelligently act. That case involved only two relatively minor technical objections to the measure. In contrast, this appeal involves numerous challenges to the measure on grounds not contemplated in *Matter Leirer v Ashare (supra)*. We bear in mind that "'opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts'" *(Danann Realty Corp. v Harris*, 5 NY2d 317, 322, quoting from *Freeman v Hewit*, 329 US 249, 252). When read in light of this caveat, *Matter of Leirer v Ashare (supra)* does not control our determination of this appeal.

For the foregoing reasons the judgment should be reversed, the order and interlocutory judgment vacated, and the proceeding dismissed on the merits.

RUBIN, J.P., SULLIVAN, HARWOOD and BALLETTA, JJ., concur.

Ordered that the appeal from the order and interlocutory judgment (one paper) of the Supreme Court, Nassau County, dated April 18, 1989, is dismissed, as it was superseded by the judgment of the same court dated April 27, 1989, and because no appeal lies from an intermediate order or from an interlocutory judgment in a proceeding pursuant to CPLR article 78; and it is further,

Ordered that the judgment is reversed, on the law, the order and interlocutory judgment is vacated, and the proceeding is dismissed on the merits; and it is further,

Ordered that the appellants are awarded one bill of costs payable by the petitioners.

SUPREME COURT OF THE STATE OF NEW YORK

Present: HON HENDERSON W. MORRISON
Justice.

In the Matter of the Application of PASQUALE J. CURCIO, JOHN ANDREW KAY and DAVID J. WILMOTT, as individuals and as residents of the County of Suffolk FOR AN ORDER PURSUANT TO ARTICLE 78 OF THE C.P.L.R., Petitioners, versus E. THOMAS BOYLE, County Attorney of the County of Suffolk, ELISABETH TAIBBI, Clerk of the Suffolk County Legislature, and HAROLD J. WITHERS and GEORGE WOLF, as Commissioners of the Suffolk County Board of Elections, Respondents.	TRIAL/IAS, PART 15 NASSAU COUNTY INDEX NUMBER 6106, 1989 MOTION DATE Apr. 12, 1989 TRIAL CAL. NUMBER ___

The following papers read on this motion_____

Notice of Motion/Order to Show Cause_____
Answering Affidavits_____
Replying Affidavits_____
Pleadings – Exhibits – Stipulation_____

Briefs: Plaintiff's/Petitioner's_____
Defendant's/Respondent's_____

By order and judgment dated April 18, 1989, I directed that the respondents Wolf and Withers appear before me on April 25, 1989, and produce the records necessary to assess the validity of certain disputed signatures annexed to the proposal submitted by the petitioner. At issue are some thirteen signatures of residents of the Town of East Hampton. As I indicated, I believe that the geographical distribution requirement of the Suffolk County Charter is unconstitutional. (S.C.C. C7-3). Upon further reflection, I believe that the Charter, by its terms, renders the geographical objection of the respondent Wolf academic. While the Charter requires the inclusion of fifty registered voters from each town (S.C.C. C7-3A), it limits the function of the Board of Elections to a determination as to whether "the petition contains the signatures of one thousand voters". (C7-3C). If it does so, the Board is directed to so certify. There is no authorization for the Board to withhold certification based upon a claim that the geographic distribution requirements are unsatisfied. Since the effect of the geographic distribution requirement is to restrict the citizens' rights to initiative and referendum, I believe it inappropriate to erect such a bar by implication.

That said, I turn now to arguments regarding the disputed signatures. The respondent Withers contends that there are fifty valid signatures from registered voters residing in the Town of East Hampton. The respondent Wolf has challenged thirteen of those signatures.

The Suffolk County Charter contains two relevant definitions which follow:

> "Registered Voter – A voter qualified to vote at the next general election."
>
> "Petition Signatures – The signatures of registered voters supporting the initiative statute of amendment and appearing on the petition."

(S.C.C. C7-2)

I will now review the challenged signatures. The numbers which follow indicate the page and line of the petition sheets where the challenged signature appears. To preserve the privacy of the individuals, I will not list their names.

43 – 9
43 – 10
43 – 11
45 – 1
97 – 13
97 – 9
102 – 1

Each of these signatures was rejected by the respondent Wolf because the residence appearing on the petition differs from that appearing on the "buff cards" maintained by the Board of Elections. This is not surprising, given our increasingly mobile society. However, the questions properly presented are the identity of the signatures (*Matter of Smith*, 359 App Div 716), and whether they were registered voters at the time of signing. As to the latter point, it is clear that a registration may be canceled when a voter changes residence without applying for a transfer of registration. (Election Law § 5-400, 5-208). However, this cancellation is not automatic. The Board of

Elections has not employed the procedure necessary to cancel the registration of any of these individuals. (Election Law § 5-402). Until this occurs, the individuals retain their status as registered voters, at least for the purposes of determining eligibility to endorse the petitioners. (*Nesci* v *Canary*, 112 AD 2d 1056, App den'd 65 NY 2d 607). Therefore, a change of residence cannot be dispositive unless it calls into question the identity of the signatory. I have examined the signatures of the individuals listed and compared them to the "buff cards" maintained by the Board of Elections. In each case, the signatures are identical or nearly so. Therefore, the challenges are without merit.

97 – 8

This signature is challenged because of an address discrepancy, and because the signature included her married name. Apparently, since the time of registration, this signer and another wed. (97 – 9). My congratulations. The use of a married name does not disqualify this signatory. She is registered and the signature, with the exception of the addition of her married name, is identical. The challenge is without merit.

44 – 2

This signature is challenged because the signer's registration was canceled after the date of signature. (Election Law § 5-400[1]). Since I believe that the rights and privileges afforded by registration may not be terminated or awarded retroactively (*Matter of Roosevelt* v Power, 22 Misc 2d 1074, rev'd 10 AD 2d 943, rev'd on opn. at 22 Misc 2d 1974, 8 NY 2d 869). The validity of the signature

should be measured as of its execution. This challenge is without merit.

44 – 11

This signature is challenged because the signatory, though registered, was not qualified to vote at the time he endorsed the petition by reason of age. (Election Law § 5-102). However, he will so qualify on May 10, 1989, and thus satisfies the definition of registered voter contained in the Suffolk County Charter. This challenge is without merit.

102 – 20

This signatory endorsed the petition sheets using a first initial only. While this does not disqualify his signature (Election Law § 6-134, there is also a residence discrepancy and the signatures on the petition and "buff card" are not similar enough to assure identity. This challenge is sustained.

43 – 2

This signature is accompanied by an address discrepancy, and I defy anyone to make any meaningful comparison with the entries which appear on the "buff cards". The petition signature is legible, a characterization that could not even with charity be applied to the records of the Board of Elections. The challenge is upheld.

45 – 4

No records have been produced which correspond with this signature. The challenge is upheld.

It is thus my conclusion that three of the challenges advanced by the respondent Wolf have merit. However, since I believe that the Board of Elections has no power under the Charter or the Constitution to reject the petitions because of geographical inadequacy, I direct that the Board of Elections certify that the petitions bear the signatures of one thousand registered voters. (S.C.C. C7-3c). This disposes of the claims by and between the petitioners and the respondents Wolf and Withers.

This order constitutes the judgment of this court and supplements my prior determination of April 18, 1989.

/s/ Henderson W. Morrison
J.S.C

X X X

Dated: April 27, 1989

In the Matter of PASQUALE J. CURCIO et al., Individually and as Residents of the County of Suffolk, Petitioners, v E. THOMAS BOYLE, as County Attorney of the County of Suffolk, et al., Respondents.

Supreme Court, Nassau County, April 18, 1989

APPEARANCES OF COUNSEL

Perry S. Reich and *Steven M. Schapiro* for Pasquale J. Curcio and another, petitioners. *Martin Bradley Ashare* for David J. Wilmott, petitioner. *John J. Bower, Barry G. Saretsky* and Dennis Milton for E. Thomas Boyle and another, respondents. *Brian McCaffrey* for Harold J. Withers, respondent. *Patrick K. Brosnahan, Jr.*, for George Wolf, respondent.

OPINION OF THE COURT

HENDERSON W. MORRISON, J.

This is a special proceeding pursuant to CPLR article 78. The petitioners seek, *inter alia*, judgment annulling a determination of the respondent E. Thomas Boyle, County Attorney of Suffolk County. The County Attorney has determined that the petitioners' proposed amendment to the County charter is illegal (Suffolk County Charter § C7-3B). The proposal, to be submitted to the voters in the next election, would substitute a system of weighted voting by a board of supervisors in place of the existing single-member-district Legislature.

The Suffolk County Charter authorizes amendment of that instrument by the voters by a process known as initiative and referendum. (Suffolk County Charter art 7.)

The process is commenced by circulation of the proposal in an effort to obtain the signatures of no less than 1,000 eligible voters, including at least 50 from each of Suffolk's 10 towns. The petitioners filed their proposal together with the petitions with the clerk of the Suffolk County Legislature. The proposal was then forwarded to the respondent Boyle for review. By letter dated March 2, 1989, the County Attorney expressed pro forma approval of the proposal. He did not return the proposal and petitions to the clerk of the Legislature as required by the Charter. On March 28, 1989, the respondent Boyle returned the proposal and petitions to the clerk of the Legislature together with a letter outlining the reasons for his change of heart regarding the legality of the proposal. The second response came well after the expiration of the time period within which the County Attorney was required to act. (Suffolk County Charter § C7-3B.)

The basis for the revision of the County Attorney's opinion was, in part, the decision of the United States Supreme Court in a case entitled *Board of Estimate v. Morris* (___US___, 109 L Ed 1433). In the view of the County Attorney, that decision prohibits the adoption of the proposed system of weighted voting. It is also argued that the proposal would violate the Voting Rights Act of 1965, would allow insufficient time for adoption, and is too vague and indefinite for submission to the electorate. There is no indication as to how these tidbits previously escaped the attention of the County Attorney.

Apart from judicial scrutiny (*Matter of Leirer v Ashare*, 132 AD2d 700), a negative opinion by the Suffolk County Attorney brings the process of initiative and referendum to an end. Therefore, the petitioners commenced this

proceeding. On its first appearance, I afforded the respondents time to answer the petition. Those answering papers have now been considered and raise additional arguments concerning the legality of the proposal. I further directed that the Board of Elections review the petitions to determine whether an adequate number of signatures had been obtained. This generated a dispute between the commissioners as to whether the required 50 signatures had been obtained from eligible voters in the Town of East Hampton. Additional memoranda have been filed with the court. The matter is now before me for determination.

I begin by noting certain ironic aspects of the respondents' position. The process of initiative and referendum is among the purest of democratic institutions for it allows the people's voice to be heard without intervening distortion. The respondents would rather silence that voice than risk the distortion they postulate as implicit in a weighted voting system. I take it as a given that the right to an equal voice in governance is no greater than the right to speak at all. I also find the position of the respondents with respect to the geographical adequacy of the petitions to be somewhat strained. Such a geographical requirement itself raises the equal protection claims which the respondents profess to embrace.

Before addressing the contentions of the parties, I must for the sake of clarity indicate what is not at issue here. The debate over the merits of weighted voting as opposed to single-member districts of equal population is a legitimate subject of comment by legal scholars and the press and public. (*See*, Newsday, Apr. 5, 1989, at 64; Apr. 9, 1989, at 11.) It may well be that the residents of Suffolk

County are satisfied with the operations of their Legislature. It is also possible that with the experience of some years, the residents might prefer a replacement. That is most preeminently a political question about which I express no opinion, as it is not my place to do so. The adherents of change and those of the status quo must plead that case in the forum of public opinion.

What this case does address, and this only, is the determination of the County Attorney that the petitioner's proposal is illegal and for that reason an unfit subject of public debate and decision.

I turn now to the specific objections raised by the County Attorney in his opinion of March 28, 1989. In doing so, I must indicate that since the natural consequence of the County Attorney's opinion is to deny the voters of Suffolk County an opportunity to vote on a matter of such consequence as their form of government, such a determination can only be sustained where the proposal is clearly illegal. Any presumption of validity afforded the opinion of the County Attorney must yield to the people's right to be heard. I need not assess the legality of the form of governance ultimately adopted under the proposal. At this stage, my inquiry is limited to a determination as to whether the proposal is, on its face, illegal.

The County Attorney's suggestion that a weighted voting system must, of necessity, effect a dilution of minority voting in violation of the Voting Rights Act is wholly undocumented, and it is conceded that the compilation of such documentation, if possible at all, would be time consuming. The mere suggestion of a violation,

standing alone, is insufficient to arrest the initiative and referendum process at birth. The claim that the proposal would allow for insufficient time to prepare a plan goes to the merits of the proposal, not its legality. I am advised by the petitioners' counsel that the arguments concerning the specificity of the plan have been addressed and rejected. (*Leirer v. Ashare*, 132 AD2d 700, *supra.)* Since I am unable to independently confirm this representation within the time constraints imposed by the nature of this proceeding, and since counsel was a party to those proceedings I will rely on his representation.

The remaining argument raised by the County Attorney's letter is that the proposal for weighted voting violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States (*Reynolds v Sims*, 377 US 533.) In this view, the County Attorney relies on the case of *Board of Estimate v Morris*, noted earlier. (___ US ___, 109 L Ed 1433, *supra.*) The petitioners argue that weighted voting has previously withstood claims that it is unconstitutional and that authority remains controlling. (*Franklin v Krause*, 32 NY2d 234, *appeal dismissed* 415 US 904; *Bechtle v Board of Supervisors*, 81 AD2d 570, *affd* 54 NY2d 674; *League of Women Voters v Nassau County Bd. of Supervisors*, 737 F2d 155, *cert denied sub nom. Schmertz v Nassau County Bd. of Supervisors*, 469 US 1108.) Therefore, the opinion of the County Attorney can only stand if it can be said with certainty that the cited cases are no longer the law.

I have reviewed the opinion of Justice White in the *Board of Estimate* case *(supra)* at length. It does not, by its terms, indicate that there the voting power of each elected official closely approximates the proportion of the

total population which elects that official. In fact, weighted voting was one of the alternatives considered by the lower courts in the *Board of Estimate* case. (*Morris v Board of Estimate*, 647 F Supp 1463, 831 F2d 384.) The Supreme Court did not address the constitutionality of these alternatives. (*Board of Estimate v Morris*, ___ US ___, n 11, *supra*, 109 L Ed 1433, 1443, n 11, *supra*.

The respondents argue that the New York Court of Appeals, in sustaining a system of weighted voting in *Franklin v Krause* (32 NY2d 234, *supra*), relied on the so-called Banzhof Index now rejected by the United States Supreme Court. The phrase conjurs up an image of tweedy academia. I do not so read *Franklin*. Rather, the analysis in *Franklin* is based upon a population analysis (*Abate v Mundt*, 403 US 182), testing whether the voters in each district are afforded as nearly an equal voice in government as possible. To the extent that *Franklin* addresses the question of the decisiveness of a vote, it does so in connection with the population patterns of the plan there considered. The proposal considered here does not have the same demographic characteristics. The references in the proposal to *Iannucci v Board of Supervisors* (20 NY2d 244) and *Franklin v Krause (supra)* are qualified by the reference to existing law at the time of implementation. Further, the proposal recites as the essential criteria a parallelism between population and voting power, in short, a mathematical analysis of population.

Since I cannot conclude that the Supreme Court has expressly or by necessary implication departed from its previous position on weighted voting, I cannot disregard the holding of the Court of Appeals in *Franklin v Krause (supra)*. (*League of Women Voters v Nassau County Bd. of*

Supervisors, 737 F2d 155, *supra*). While I appreciate the respondents' argument that the holding in *Franklin v Krause* should be reconsidered, that duty appropriately falls to its authors, or to those who have legal capacity to review its wisdom. That does not, I should think, include the County Attorney or myself.

The respondents argued for the first time before me that the proposal violated section 10 of the Municipal Home Rule Law. (Municipal Home Rule Law § 10 [1] [ii] [a] [13] [f].) The timing is irrelevant since the legality of the proposal is not a waivable proposition. Section 10 proscribes any effort to restructure a local legislative body more than once each decade commencing with 1970. A decade is a 10-year period beginning with a year ending in zero. (Webster's Third New International Dictionary 583.) The districts comprising the Suffolk County Legislature were altered last in 1981, an act which constitutes a restructuring within the meaning of the Municipal Home Rule Law. The proposed Charter amendment can take effect, if at all, no earlier than January of 1990. It therefore falls outside the temporal limitation of the Municipal Home Rule Law. No more expansive reading of the statute would appear warranted since it divests local government of the power to restructure even to cure inequities.

I turn now to the final argument of the respondents. I the respondent Wolf has challenged the validity of 13 of the signatures submitted by the petitioners from eligible voters in the Town of East Hampton. This, of necessity, brings into consideration the validity of the geographical distribution requirement from an equal protection standpoint. The respondents who argue so vociferously for

equality of representation find such concepts wholly foreign to the petition process. I do not agree, and for reasons beyond logical consistency.

Rigid formulas of geographical distribution were considered and rejected in connection with nominating petitions in a case entitled *Socialist Workers Party v Rockefeller* because they overweighted and overvalued the votes of those living in less populated counties (*Socialist Workers Party v Rockefeller*, 314 F Supp 984, *affd without opn* 400 US 806; *see also, Moritt v Governor of State of N.Y.*, 42 NY2d 347, *appeal dismissed* 434 US 1029). The respondents argue the equal protection guarantees are inapplicable to the petition process utilized in connection with initiative and referendum, citing *Lockport v Citizens for Community Action* (430 US 259). In that case, Justice Stewart sustained a differential voting requirement in connection with the adoption of the Niagara County Charter (Municipal Home Rule Law § 33 [7]. The court held that one man, one vote principles "are of limited relevance * * * in analyzing the propriety of recognizing distinctive voter interests in a 'single shot' referendum" (430 US 259, 266, *supra*). However, the propriety of a differential voting requirement was based upon a demonstration that the proposal would have a disproportionate impact on an identifiable group of voters. The existence of such a consideration has not been demonstrated here. More importantly, the differential voting requirement assumes that a referendum will be held, which is precisely the issue here. It is one thing to recognize the interests of local government units. It is quite another thing to overvalue the political power of the residents of a given unit to the point that they hold a veto power over the right of their

brethren to vote all. The point is aptly illustrated here where the citizens' right to initiative and referendum turns on the validity of the signatures of 13 voters from the Town of East Hampton.

Upon adoption of the Suffolk County Charter, the citizens reserved the right to alter their government by initiative and referendum. This is a right not to be lightly disregarded. In rejecting a geographical requirement for signatures for the formation of a party, the Supreme Court held that –

"By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. * * *

"When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." (*Illinois Elections Bd. v Socialist Workers Party*, 440 US 173, 184.)

The cited case further indicates even in the case of a compelling State interest, the State is required to adopt the least drastic means necessary to achieve its ends. While I can posit the desirability of geographic diversity, the means to insure such diversity must, at a minimum, comport with constitutional guarantees where the right to vote is at issue. The geographical requirement contained in section C7-3 of the Suffolk County Charter does not and to the extent only, the section is unconstitutional.

The petitioners are entitled to judgment vacating the determination of the Suffolk County Attorney and declaring that the proposal is legal and proper for purposes of a Charter amendment. The petitioner are also entitled to judgment declaring that the petitions as filed satisfy the requirements of the Suffolk County Charter. (Suffolk County Charter § C7-3A.) It is so ordered. Since the proposal has already been referred to the clerk of the Suffolk County Legislature and the Board of Elections, the matter is now before County Legislature and the Board of Elections, the matter is now before the County Legislature for consideration (Suffolk County Charter § C7-3D), subject to appellate direction. In anticipation of such review, I will sever and continue the claims between the respondents Withers and Wolf for the purpose of conducting a hearing on the challenge to the petitions. This will afford the Appellate Division, Second Department, a complete record should they find my analysis of the geographic requirements erroneous.

The respondents Wolf and Withers shall appear at I.A.S. Part 15 on April 25 1989, at 9:30 a.m., and produce all records necessary for review of that portion of the petition which has been challenged.

AMENDMENTS TO CONSTITUTION OF THE UNITED STATES

Amend. 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction that equal protection of the laws.